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PP

v.

MUHAMAD ASIKIN BAKAR

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HIGH COURT MALAYA, KANGAR
ZAMANI RAHIM JC
[CRIMINAL APPEAL NO: 41-03-08]
27 NOVEMBER 2008

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 6 and 15(1)(a) - Possession of cannabis and self-administration or consumption of dangerous drugs - Appeal against inadequacy of sentence - Factors to be considered - Plea of guilt - Previous convictions - Public interest*

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CRIMINAL PROCEDURE: *Sentence - Inadequacy of sentence - Appeal against - Possession of cannabis and self-administration or consumption of dangerous drugs - Factors to be considered - Plea of guilt - Previous convictions - Public interest - Dangerous Drugs Act 1952, ss. 6, 15(1)(a)*

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The respondent/accused was charged at the Magistrate's Court with, firstly, an amended charge for the offence of possession of cannabis under s. 6 of the Dangerous Drugs Act 1952 ('Act'), and, secondly, an additional charge for the offence of self-administration or consumption of dangerous drugs under s. 15(1)(a) of the Act. The Magistrate, having accepted the accused's plea of guilt, sentenced him to a fine of RM2,000 in default of nine months' imprisonment for the first charge, and a fine

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of RM1,500 in default of six months' imprisonment and three years' police supervision for the second charge. The accused paid both the fines. Dissatisfied with the Magistrate's decision, the prosecution appealed.

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Held (allowing the appeal):

(1) On the facts, the accused had four previous convictions. The first conviction was for theft and should not be taken into consideration as it was of a totally different nature from the current charges. The second, third and fourth convictions were all for possession of

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cannabis from the years 1997 to 2000, showing that the accused was a persistent and habitual offender. He was not a remorseful person, contrary to what the Magistrate found him to be. The Magistrate, by accepting that the accused's plea of guilt showed his repentance, had been hoodwinked. The current offences were

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committed about one year and 11 months after he was released from prison on 21 September 2005 after serving a nine-year

imprisonment term in respect of the fourth conviction. The lengthy custodial sentence seemed to have failed to reform and rehabilitate the accused. In assessing the sentence in this case, the Magistrate had placed undue emphasis on the accused's responsibilities towards his family and also that the drugs were only for the accused's personal consumption. Although the Magistrate claimed that he had taken the public interest factor into account, it was merely lip service. It was certainly not reflected in the sentences passed on the accused. Having regard to the aforesaid grounds, the sentences were inappropriate and inadequate. (paras 12, 13, 14, 15 & 16)

[Setting aside sentences imposed by Magistrate and substituting in their places sentences of 36 months' imprisonment for first amended charge and 20 months' imprisonment for additional charge to run concurrently from this date, and three years' supervision by a rehabilitation officer under s. 38B(1) of the Act after serving term of imprisonment.]

Case(s) referred to:
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
Rex v. Grondkowski [1946] 1 All ER 560 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 295
Dangerous Drugs Act 1952, ss. 6, 15(1)(a), 38B(1), 39A(1), (2)
Penal Code, s. 379

For the prosecution - Azman Abu Hassan; DPP
For the respondent - Razairul Haffiz; M/s Razairul Haffiz & Co

Reported by Suresh Nathan

JUDGMENT

Zamani Rahim JC:

[1] The respondent (whom I shall refer to as "the accused") was charged at Kangar Magistrate's Court 11 with two charges - a first amended charge for an offence of possession of cannabis under s. 6 of the DDA and an additional charge for an offence of self-administration or consumption of dangerous drugs under s. 15(1)(a) of the DDA as follows:

1) First amended charge

Bahawa kamu pada 29 August 2007 jam lebih kurang 1.30 pagi di sebuah rumah No. 149, Kampung Bendang Baru, Jalan Tambun Tulang, Simpang Empat, di dalam Daerah Kangar, di dalam Negeri

A Perlis, telah ada dalam kawalan kamu cannabis seberat 1.22 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s. 6 Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen yang sama.

B 2) Additional charge

Bahawa kamu pada 29 August 2007 jam lebih kurang 1.30 pagi di sebuah rumah No. 149, Kampung Bendang Baru, Jalan Tambun Tulang, Simpang Empat, di dalam daerah Kangar, di dalam Negeri Perlis telah menggunakan dadah berbahaya iaitu 11-nor-delta-9-
C tetrahydrocannabino - 9 carboxylic acid dengan itu kamu telah melakukan suatu kesalahan di bawah s. 15(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s. 15 Akta yang sama.

D **[2]** The proceedings before the Magistrate run as follows.

[3] The accused was first charged before the Magistrate on 3 September 2007 for possession of cannabis weighing 1.22 grammes, an offence under s. 6 of the DDA. He admitted to the charge. The prosecutor requested another date awaiting the return of exhibits which
E were sent to the Chemistry Department and its chemist report.

[4] On 8 October 2007 the accused still maintained his plea of guilty. Again the prosecution was not ready. The chemist and finger print reports were not available. The case was adjourned to 22 November 2007 for facts and sentence.

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[5] On 22 November 2007 the prosecution tendered an amended charge for the existing charge. On top of that, the prosecution put in an additional charge for an offence of self-administration or consumption of dangerous drugs, to wit, 11-nor-delta-9-tetrahydrocannabinol-9-
G carboxylic acid under s. 15(1)(a) of the DDA. The accused still maintained his plea of guilty to both the charges.

[6] As the prosecution was tendering the exhibit, a plastic packet containing 1.22 grammes of cannabis, the accused disputed it. According to him it was not recovered from his possession. The Magistrate had
H rightly rejected the accused plea of guilty as the plea was no longer unequivocal. The Magistrate fixed a mention date on 18 January 2008 for the accused to get the services of counsel.

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[7] On 18 January 2008 the accused had changed his mind and did not wish to dispute the said exhibit. He also did not wish to engage counsel. At the last appearance in court, he doubted about the exhibit as it looked bigger than originally was. Now he wish to admit it. All the exhibits were reproduced before the court.

[8] Having accepted the accused's plea of guilty and heard his mitigation, the Magistrate sentenced him to a fine of RM2,000 in default nine months imprisonment term in respect of the first amended charge and a fine of RM1,500 in default six months imprisonment term and three years police supervision. Both the fines were paid by the accused.

[9] Dissatisfied with the decision of the Magistrate, the prosecution appealed. In its petition of appeal, the prosecution contended the Magistrate had erred:

i) Apabila tidak mengambil kira empat (4) sabitan lalu OKT sedangkan kesalahan lalu tersebut adalah begitu serius.

ii) Apabila mengambilkira pengakuan bersalah sebagai menunjukkan keinsafan OKT walaupun jelas dapat dilihat bahawa OKT tiada langsung tanda-tanda penyesalan.

iii) Apabila mengambil kira tanggungjawab OKT (Penentang) terhadap keluarga sebagai salah satu faktor untuk menjatuhkan hukuman ringan sedangkan fakta adalah menunjukkan sebaliknya.

[10] The Magistrate passed the sentences as he did, based on three grounds. Firstly, the accused's plea of guilty had saved time, cost and energy. The guilty plea had shown the accused had repented. Secondly, the accused had heavy responsibilities towards his wife and two school going children. A non-custodial sentence, for example the fines imposed by the Magistrate herein, would afford an opportunity for the accused to carry out these responsibilities effectively. Thirdly, the public interest is to be balanced with the accused interest. The drugs were in negligible amount which were meant for personal consumption only. Nothing more.

[11] It is clear that the Magistrate did not take into consideration the accused's previous convictions at all, despite they were brought to the attention of the Magistrate by the prosecutor. Now let us scrutinize the accused's previous convictions.

[12] The first conviction was for theft under s. 379 of the Penal Code where he was sentenced to 12 months imprisonment with effect from date of arrest on 21 October 1993. The offence of theft was totally of different nature from the current charges. It should not be taken into account. The second, third and fourth previous convictions were all

A pertaining to drugs cannabis. It began in 1997 for possession of cannabis, an offence under s. 6 of the DDA where he was sentenced to three months imprisonment term from date of arrest on 28 April 1997. The following year in 1998, he was convicted for a more serious offence of possession of drugs under s. 39A(1) of the DDA where he was B sentenced to two years imprisonment term with effect from date of arrest on 26 February 1998 and three strokes of whipping. About two years later in 2000, the accused had "graduated" to even more serious offence of drugs possession under s. 39A(2) of the DDA where he was convicted and sentenced to nine years imprisonment term with effect C from date of arrest on 21 September 1999 and ten strokes of whipping. The accused three convictions for drugs from the year 1997 to 2000 speak for itself. He is a persistent and habitual offender. He is not a remorseful person, contrary to what the Magistrate found him to be. According to the Magistrate, by pleading guilty he had shown repentance. The Magistrate must be hoodwinked by the accused. The D current offences were committed about 1 year 11 months after he was released from prison on 21 September 2005 after serving the nine year imprisonment term in respect of the fourth conviction. The lengthy custodial sentence seemed to have failed to reform and rehabilitate the accused.

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[13] In assessing sentence in this case, the Magistrate had placed undue emphasis on the accused responsibility towards his family and also the drugs was for his consumption only so that it outweighed the public interest factor. In *Rex v. Grondkowski* [1946] 1 All ER 560, Lord F Goddard LCJ made the following observation:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interest of the prisoners.

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[14] The above passage was cited with approval in the Criminal Revision case of *PP v. Loo Choon Fatt* [1976] 1 LNS 102.

[15] Though the Magistrate claimed that he had taken the public interest factor into account, it was merely a lip service. Certainly it was H not reflected on the sentences passed on the accused.

[16] Having regard to the aforesaid grounds, I find that the sentences of a fine of RM2,000 in default nine months imprisonment and a fine of RM1,500 in default six months imprisonment and three years police supervision, presumably made under s. 295 of the Criminal Procedure I Code are inappropriate and inadequate having regard the accused previous convictions and the public interest as a whole.

[17] I, therefore, allowed the appellant's appeal and set aside the sentences imposed by the Magistrate and substituted in its place the sentence of 36 months' imprisonment for the first amended charge and 20 months' imprisonment for the additional charge to run concurrently from today and three years supervision by a rehabilitation officer under s. 38B(1) of the Dangerous Drugs Act after the accused having served the imprisonment term. The fines paid were to be refunded.

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